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ABSTRACT

Recently, there has been a definite shift away from United States government support for the unrestricted exchange of new, unclassified scientific and technical information at professional meetings. This has been substantiated by numerous specific examples of censorship by branches of the government. Scientists in the target professional associations frequently work on basic research and advanced technical systems for the Department of Defense. Since in no case have the scientists sought judicial relief from what is undoubtedly governmental prior restraint, any projection as to how this conflict between the First Amendment and national security interests would be resolved must rely on previous case law. The Supreme Court has never enunciated a clear description of what constitutes justification for prior restraint; nor has it deferred judgments on the validity of prior restraints to a case-by-case evaluation. Some minimal standards have been identified to guide the judiciary in application of restraints. First, the restraint must be specifically authorized by legislation; and second, the government must prove that the communication "inevitably, directly, and immediately" causes serious damage to the government or the population. There is serious doubt as to whether the government could meet this test of inevitable harm, but given its repeated efforts to prohibit presentations at scientific symposia and the minimal resistance the government has encountered, this trend is likely to continue. (HTH)

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Governmental Restraints on the Exchange of Scientific Communications

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Governmental Restraints on the Exchange of Scientific Communications

The First Amendment's guarantee of freedom of speech is cardinal among our Constitutional rights. Though highly prized, Americans' freedom of speech is challenged almost daily in the courts with cases ranging from instances of alleged obscenity and defamation of character to national security threats. A rarely publicized example of the struggle between the First Amendment's right to freedom of speech and the federal government's pursuit of protection of the nation's security is the repeated efforts to restrain scientists speaking at professional meetings. This paper examines the governmental restriction of these unclassified scientific communications.

According to the Committee on Scientific Freedom and Responsibility of the American Association for the Advancement of Science (AAAS), four professional societies have been the primary focus of government restrictions in the last five years.[1] These societies include the American Vacuum Society, the Institute of Electrical and Electronic Engineers, the Society of Photo-Optical Instrumentation Engineers, and the Optical Society of America. Apart from sharing the dubious distinction of having been censored so many times, the scientists in these associations share another common bond: they frequently work on basic research and advanced technical systems

funded by the Department of Defense.

In the past, open and unrestricted exchange at professional meetings of new unclassified scientific and technical information - including information derived from research funded by the Defense Department - has been the cornerstone of U. S. science policy and an extension of the First Amendment's guarantee of free speech. But in the recent past there has been a definite shift away from government support for that exchange. On numerous occasions government officials have sought to limit participation by scientists in professional symposia, conferences and other similar forums accessible to scientists from adversary nations.[2] In so doing, the government has exceeded its previous restrictions of free speech.

While the Defense Department is the most vigorous champion of "national security," they are by no means the only government agency involved in this crusade.[3] The American Vacuum Society (AVS) discovered this at its first Bubble Memory Conference in February, 1980, the first of three clashes the Society would encounter with the government. A few days before the conference, the Commerce Department informed the President, Dr. John Vossen, that the meeting was covered by regulations dealing with exports and that "oral exchanges of information in the United States with foreign nationals constitute export of technical data."[4] The DOC implied that any presentations at the AVS meeting would be subject to an export license and failure to comply would result in criminal prosecution. As a result, the society

was forced to withdraw nine invitations to scheduled attendees from Hungary, Poland and the Soviet Union.

The AVS opposed the government again in December of 1981 at its second Bubble Memory Conference; however, this time the Defense Department did the government's bidding. DOD Deputy Secretary Frank Carlucci, in a letter to AAAS Executive Officer William Carey, stated that "Soviets exploit scientific exchanges in a highly orchestrated and centrally directed effort" to gain sensitive technical information from the U. S.[5] As a specific example, Mr. Carlucci stated that Hungarian physicist Gyorgy Zimmer "provided the Soviets the scientific knowledge on magnetic bubble memories gained as a result of his frequent visits to U. S. laboratories."[6]

In response to Mr. Carlucci's statements, Dr. Zimmer wrote to the editor of Science stating that he believed "the unrestricted exchange of ideas is an important driving force in the advancement of science."[7] Ironically, Dr. Zimmer was denied participation in the conference on the basis of a report that he was a security risk.

At the AVS's third confrontation with the government a certain degree of cloak and dagger presented itself. In the middle of the society's annual meeting in November, 1983, Alfred Zehe, an East German physicist and an exchange scholar at the University of Puebla in Mexico, was arrested by the FBI and charged with espionage.[8] After Zehe was arrested, the FBI requested a list of the 2,600 individuals who attended the meeting, threatening to subpoena the list if it was

not supplied. The society said that the list would not be turned over voluntarily, but that they would comply with a subpoena.

In addition to the AVS, the Institute of Electrical and Electronic Engineers (IEEE) has been censored several times. In fact, the Institute holds the unglorious record for attempts at government censorship with a total of five instances recorded between February, 1980 and November, 1983.[9] While that record may not fina a place in the Guinness Book of Records, it is significant for so short a length of time. In February, 1980, just before a laser conference began, the Institute was notified by the State Department that nine Soviet scientists were prohibited f.om attending. In a tenuous explanation the State Department cited the open display of certain equipment which could have military potential to justify the visa restrictions.[10]

For those who seek a way to end government censorship a lesson can be learned from the IEEE's second encounter with government censors. In September, 1983, prior to a conference on aerospace systems, the chairman was asked by the Air Force to destroy all records and to cancel all presentations of certain papers which were considered to be "compromising national security."[11] The chairman said that he would do so if the estimated cost of between $25,000 to $50,000 were borne by the Air Force. A day later the request was withdrawn.[12] It would appear that while national security is important to the Air Force, $25,000 is just too high a price.

Government censors notified the Institute once again in November,

1982 at an international test conference. At this meeting three papers which were previously approved for presentation, were asked to be withdrawn due to potential damage to U. S. interests.[13] However, after much adverse publicity, the Air Force re-reviewed the papers, approving the presentations at the conference.[14]

The IEEE was censored for a fourth time in a joint meeting with the Polar Research Board and the National Academy of Science-National Research Council in July, 1983. Six DOD-sponsored papers were withdrawn due to possible national security implications.[15] The papers removed involved no classified information and concerned topics where the United States holds a dubious or non-existent lead over the Soviet Union.[16]

The Institute's most recent melee with government officials occurred in November, 1983 at a national telesystems conference. Dr. William Hurd, of the Jet Propulsion Laboratory, was told to delete a three word phrase from his paper on digital systems.[17] Dr. Hurd said that he had never signed any contract with the Air Force and that he was not aware the Air Force required clearance of articles arising from the project. Nevertheless, Dr. Hurd and the conference organizers were obliged to go through all nine hundred copies of the paper with a magic marker removing the phrase.[18]

The Society of Photo-Optical Instrumentation Engineers (SPOIE) has also been suppressed by the Defense Department. The first of two instances occurred in August, 1982 at an international technical

symposium sponsored by the society. More than one hundred papers which had been cleared for presentation were withdrawn under orders of the Pentagon.[19] The papers were removed because they contained information that could not be exported to America's adversaries and because of the presence of representatives from the Soviet Union, according to the Defense Department.[20]

The SPOIE's second censoring involved a joint meeting with the American Institute of Aeronautics and Astronautics and the Optical Society of America in October, 1982.[21] A number of papers were withdrawn from the meeting as a result of confusion over the extent of possible problems with the DOD.[22]

In October, 1982, less than two weeks after the above incident, the Optical Society of America had to contend with the Pentagon once again when the Pentagon ordered six scientists to withdraw papers from the society's annual meeting based on "national security problems."[23] The papers, dealing with laser communications, had "serious defense implications" according to the Pentagon.

The examples of government censorship of these four societies by no means represent all instances of free speech suppression; however, because these societies have all been censored several times by the U. S. government, in particular the Defense Department, they merit special consideration. Two additional government efforts at censorship deserve attention. In January, 1984, at a UCLA conference on arms control the Air Force attempted unsuccessfully to prevent a

political scientist from delivering a paper on satellite systems.[24] The Air Force failed because Dr. Jeffrey Richelson, the author of the paper, obtained all of this information from unclassified, publicly available sources. The Air Force contends, however, that unclassified material can be put together into a classified whole.[25]

Where the Air Force failed, the Navy has apparently succeeded. In April, 1984 Vice Admiral R. A. Miller, vice chief of naval material, issued a memo prohibiting Navy civilian employees from actively participating in non-DOD sponsored symposia, conferences or other similar forums on weapons and technology related subjects.[26]

The repeated actions of the the federal government to prevent the presentation of papers at professional meetings is undoubtedly prior restraint. Rarely have the authors of these papers been threatened with subsequent punishment, although their activities may have violated federal legislation. Since in no case have the scientists sought judicial relief from governmental prior restraints, any projection as to how the conflict between the First Amendment and national security interests would be resolved must rely on previous case law.

The position of the United State Supreme Court on the use of prior restraints is quite clear. The ruling in New York Times Co. v. United States (quoting Bantam Books, Inc. v. Sullivan) noted: "Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity."[27] In most

instances a law serving to restrain communication prior to its presentation would be considered a per se violation of the First Amendment. Six years after the New York Times decision, the Chief Justice echoed this view in Nebraska Press Association v. Stuart: "The thread running through all these cases is that prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights."[28]

There are, however, exceptions to a prohibition on prior restraints. Justice Brennan, in a concurring opinion in Nebraska Press, referred to "a narrow class of cases in which the First Amendment's ban on prior judicial restraint may be overriden."[29] In Near v. Minnesota[30] the Court provided several examples of what might qualify as exceptional cases. Examples involved restraining the publication of information concerning the movement of troops or the sailing of troop ships. Although the case at hand involved a Minnesota statute designed to gag the press from publishing malicious or scandalous statements, the national security examples employed in Near have served as precedent in later Court rulings.

The Court has never enunciated a clear description of what constitutes justification for prior restraint, neither has the Court deferred judgments on the validity of prior restraints to a case-by-case evaluation. Some minimal standards have been identified to guide the judiciary in application of these restraints. First, the restraint must be specifically authorized by legislation.[31] Given the

enormous power of prior restraints to "chill" communication, the Court will only find them justified when they are consistent legislative objectives.

A second standard for evaluation of prior restraints requires that the government prove the communication "inevitably, directly, and immediately" causes serious damage to the United States government or its population.[32] At this point the Court is judging whether the risk to national security is intolerably great, thereby providing sufficient justification to restrain in advance those communications.

The question at hand then is whether prior restraints on the communication of scientific information at professional meetings meet these standards. Were the government to be forced to prove the validity of restraints, they would likely rely on one of two acts of legislation. The Export Administration Act of 1979, though primarily concerned with the licensing of exportable technologies, forbids the domestic release of information concerning the manufacture of any military-related materials.[33] A second piece of legislation, the Arms Export Control Act, includes restrictions on the transmission of any information relevant to the development of military hardware.[34] Either statute may provide grounds for governmental action to impose prior restraints on scientific symposiums. To date, the Court has not been asked to rule on the constitutionality of these statutes.

Whether prior restraints on the presentation of scientific papers would meet the second standard is more questionable. Will the

information available at these scientific meetings lead to inevitable, direct and immediate harm to this country? The requirement that the government shoulder the burden of proof on this issue was the central focus of the attempt to prevent the Progressive from publishing details on the construction of an atomic bomb.[35] In that case, a district judge ruled that the information in the article had the potential to lead to the thermonuclear annihilation of the nation. That result would undoubtedly "nullify the right to free speech and to endanger the right to life itself."[36]

Whether the contents of the scientific papers have equal potential to damage this nation is in doubt. The Court's standard requires that the damage be inevitable, but that will only be the case if a nation threatening the United States is able to convert theoretical information into weapons applications. Thane Gustafson of the Rand Institute argues that America's primary rival, the Soviet Union, is not in a position to exploit this information. He cites:

> ...a lack of experienced entrepreneurs who can "sell" the results of research to industry, a scarcity of new materials and supplies, and difficulty in obtaining "nonstandard" equipment from separate ministries. Innovation is further retarded by administrative and physical barriers-research and design institutes, pilot plants, and factories are seldom under the same roof and may even be in different administrative jurisdictions with conflicting outlooks and priorities.[37]

There is then serious doubt as to whether the government could meet the test of inevitable harm.

If the Soviet Union is at some point capable of converting the

scientific information into a potent weapons system, the government will still not have demonstrated that the threat is immediate. The ability of the Soviets to make quick use of date is minimal. The National Academy of Sciences named a panel on Scientific Communication and National Security to investigate the problem. The panel found:

> ...that information acquired through open communication or by means of espionage activities on U. S. campuses may not often add substantially to the Soviet military capacity in the near term. The designers of Soviet military systems are conservative, and thus new scientific advances, whatever their origin, may not be readily adopted in military systems.[38]

The conclusions of the panel indicated that there is no near-term danger from the release of these scientific communications. The requirement of proving immediate harm to this country is also unlikely to be demonstrated by the government.

If the government is unable to prove the inevitability or immediacy of damage, as was the case in the New York Times, it may rely on other means to stiffle the communications. If the scientists are full or part-time employees of the federal government, then restraints may be placed upon them as a condition of employment. The recent cases of former CIA agents Agee and Snepp illustrate this approach to restraint. In Agee's case, the Court denied Agee a passport to travel and speak in other nations. The Court found Agee's statements had "the declared purpose of obstructing intelligence operations and the recruiting of intelligence personnel."[39] In Snepp, the Court upheld the government's power to impose reasonable

restrictions on the communication of information obtained through government employment.[40]

The standard for deciding what a government employee may be restrained from communicating appears to be grounded in the earlier case of Pickering v. Board of Education. In order to be constitutionally valid, the Court ruled, any restrictions on a government employee's free speech rights must be for the purpose of preventing actual impairment to the efficient operation of the services of the employer.[41] Though this may provide looser criteria for restraining the communication of federally employed scientists, it is doubtful that the government can demonstrate that the scientific meeting impairs the operation of the agencies employing the scientists. Even then, only a portion of those papers previously restrained would be effected by this justification.

Given the repeated efforts of the federal government to prohibit presentations at scientific symposia, it is quite likely that the trend will continue. This is particularly so in light of the minimal resistance that has faced the government. To date, no attempt has been made to seek judicial relief from the restraints on communication. This paper has examined the principle issues that the Courts would face in resolving the conflict between the First Amendment and the demands of national security.

Notes

[1]American Association for the Advancement of Science Committee on Scientific Freedom and Responsibility, National Security and Scientific Communication Professional Society Chronology, April, 1984; hereafter cited as NSSCPSC.

[2]NSSCPSC.

[3]NSSCPSC.

[4]Michael E. Jacobs, "Will Export Regulations Affect Academic Freedom?" Physics Today, June 1981, pp. 55-57.

[5]"Scientific Exchanges and U.S. National Security," Science, 8 Jan. 1981, p. 139.

[6]"Scientific Exchanges and U.S. National Security," Science, 8 Jan. 1981, p. 139.

[7]Gyorgy Zimmer, "International Scientific Exchanges: Additional Views," Science, 9 April 1982, p. 124.

[8]Colin Norman, "To Catch a Spy," Science, 25 Nov. 1983, p. 904.

[9]NSSCPSC.

[10]Nicholas Wade, "Science Meetings Catch the U.S. - Soviet Chill," 7 Mar. 1980, pp. 1056, 1058.

[11]NSSCPSC, p. A-4.

[12]NSSCPSC, p. A-4.

[13]The Institute, 7, No. 1, Jan. 1983, p. 1.

[14]The Institute, 7, No. 1, Jan. 1983, p. 1.

[15]Ross Gelbspan, "One Case of Papers Being Withdrawn," The Boston Globe, 22 Jan. 1984, p. 7.

[16]NSSCPSC.

[17]The Institute, 8, No. 3, Mar. 1984, p. 1.

[18]NSSCPSC, p. A-7.

[19]Joel Greenspan, "Remote Censoring: DOD Blocks Symposium Papers," Science News, 9 Sept. 1982, p. 148.

[20]NSSCPSC, p. A-3.

[21]NSSCPSC, p. A-4.

[22]NSSCPSC, p. A-4.

[23]Kim McDonald, "Pentagon Blocked 6 Scientists, Optics Researchers Charge," Chronicle of Higher Education, 3 Nov. 1982, p. 1.

[24]Lee Dembart, "Air Force Fails in Effort to Muzzle Speaker at UCLA," Los Angeles Times, 27 Jan. 1984, sec. 2, p. 1.

[25]Dembart, sec. 2, p. 1.

[26]Eliot Marshal, "Do Seminars Leak Navy Secrets?" Science, 29 June 1984, p. 1409.

[27]403 U.S. 713, 714. (1971).

[28]427 U.S. 539, 599. (1976).

[29]Ibid., 593.

[30]283 U.S. 697, 716 (1931).

[31]403 U.S. 713, 732-740 (1971).

[32]Ibid., 726-727.

[33]50 U.S. Code Appendix, section 2401-20 (1979).

[34]22 U.S. Code, section 2778 (1976).

[35]United States v. The Progressive, Inc., 467 F.Supp. 990 (1979).

[36]Ibid., 995.

[37]Thane Gustafson, "U.S. Export Controls and Soviet Technology," Technology Review, February/March 1982, p. 34.

[38]Panel on Scientific Communication and National Security, Scientific Communication and National Security, Washington: National Academy Press, 1982, p. 41.

[39]Haig v. Agee, 453 U.S. 280, 309 (1981).

[40]Snepp v. United States, 444 U.S. 507 (1980).

[41]391 U.S. 563, 568-573 (1968).